Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. 00-

IN THE

Supreme Court of the United States

MARIO JIMENEZ,

Petitioner,

v.

HIALEAH HOUSING AUTHORITY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Court of Appeals' dismissal for want of prosecution of a party's timely-filed appeal based upon his counsel's failure to file the brief until seven days past the deadline, given counsel's debilitating catastrophic illness that caused him to be briefly hospitalized and bedridden in the days immediately prior to the deadline, and where the opposing party was not prejudiced by the short delay, conflict with precedent in other circuits and in this Court that an appeal should not be dismissed for counsel's failure to file the brief on time where counsel has experienced extraordinary and compelling personal circumstances?

PARTIES TO THE PROCEEDING

The parties to the proceeding are Mario Jimenez, appellant/plaintiff below, and the Hialeah Housing Authority, a political subdivision of the City of Hialeah, Florida, appellee/defendant below.

Petitioner Mario Jimenez respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit ("Court of Appeals") in the case of *Mario Jimenez, Appellant v. Hialeah Housing Authority*, Case No: 00-12139-C.

OPINIONS BELOW

The Court of Appeals' decision, which was rendered without an opinion on October 5, 2000, is not reported.

The Court of Appeals denied Petitioner's motion to set aside its Clerk's entry of dismissal for want of prosecution and to reinstate Petitioner's timely-filed appeal from the district court's summary final judgment.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was rendered final on October 5, 2000 when it denied Petitioner's motion for reconsideration, which was expressly construed by the Court of Appeals as a motion to reinstate the appeal that was dismissed by its Clerk for want of prosecution for failure of Petitioner's counsel to file his brief on time.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The fundamental question in this case is whether the decision of the Court of Appeals to dismiss Petitioner's timely-filed appeal for failure of his counsel to file his brief on time, where Petitioner attempted to file the brief seven days past the deadline, given his counsel's extraordinary and compelling personal circumstances, and where Respondent was not prejudiced by the short delay, conflicts with precedent in other circuits and in this Court.

Petitioner was a litigant under the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*, the Family and Medical Leave Act, 29 U.S.C. § 2601, *et seq.*, and other federal and state laws. The original jurisdiction of the district court was invoked pursuant to 28 U.S.C. § 1331. The district court granted summary final judgment dismissing all of Petitioner's claims.

Petitioner timely appealed the summary final judgment to the Court of Appeals. The Court of Appeals granted Petitioner one extension of thirty days to file his brief based upon his counsel's illness.

Thereafter, Petitioner's brief became due on July 6, 2000. On or about July 1, 2000, Petitioner's counsel became seriously ill with the sudden recurrence of symptoms of acute Hepatitis B and chronic liver disease with which he had been diagnosed earlier that year. Petitioner's counsel was briefly hospitalized and bedridden during July 1-6, 2000.

Upon returning to his office on July 6, 2000, Petitioner's counsel failed to request from the Court of Appeals an additional extension to file the brief. Instead, he attempted to file the brief, record excerpts and a motion for leave to file Petitioner's brief out of time with the Court of Appeals on July 13, 2000.

The Clerk of the Court of Appeals dismissed Petitioner's appeal for want of prosecution on July 26, 2000 after receiving Petitioner's brief, record excerpts and motion. A panel decision denying Petitioner's motion for reconsideration, expressly construed by the Court of Appeals as a motion to reinstate Petitioner's appeal, was filed October 5, 2000.

REASONS FOR GRANTING THE WRIT

The Court of Appeals' dismissal of Petitioner's appeal for want of prosecution for his counsel's failure to file the brief on time, where Petitioner attempted to file the brief just seven days

past the deadline, given counsel's extraordinary and compelling circumstances (sudden recurrence of symptoms of acute Hepatitis B and chronic liver disease that caused Petitioner's counsel to be briefly hospitalized and bedridden in the days immediately prior to the deadline) and where Respondent was not prejudiced by the short delay, conflicts with precedent in other circuits and in this Court.

Courts throughout the United States of America have consistently held that appeals should be decided, if at all possible, on the merits and that a decision on the merits should not be avoided on the basis of mere technicalities. *Jones v. Chaney & James Const. Co.*, 399 F.2d 84 (5th Cir. 1968); *Foman v. Davis*, 371 U.S. 178, 181, 83 S. Ct. 227, 230, 9 L. Ed. 222, 225 (1962); *Morrison v. Texas Co.*, 289 F.2d 382 (7th Cir. 1961).

In determining appropriate sanctions against an appellant who fails to strictly observe briefing deadlines, the courts usually look at whether an appellee has been prejudiced. *Tidwell v. Dees*, 464 F.2d 1297 (5th Cir. 1972).

Here, without any showing that the Respondent was prejudiced as a result of Petitioner's late filing of his brief, the Court of Appeals dismissed Petitioner's appeal when his counsel attempted to file the brief seven days past the deadline.

However, both the Third Circuit and, by implication, this Court have held that an appeal should not be dismissed for counsel's failure to file the brief on time where counsel has experienced extraordinary and compelling personal circumstances. *Matute v. Procoast Navigation, Ltd.*, 928 F.2d 627 (3d Cir. 1991), *cert. denied*, 502 U.S. 919, 116 L. Ed. 270, 112 S. Ct. 329 (1991).

The serious illness of Petitioner's counsel was well documented. He had been diagnosed with acute Hepatitis B

and chronic liver disease in March of 2000, rendering him temporarily disabled. As of June of 2000, his catastrophic illnesses appeared to be in remission and/or his symptoms had abated. Believing that he would be able to complete Petitioner's brief by the July 6, 2000 deadline, Petitioner's counsel did not request an additional extension from the Court of Appeals before the deadline.

However, on or about July 1, 2000, Petitioner's counsel experienced a sudden recurrence of his symptoms that caused him to be briefly hospitalized and bedridden during July 1-6, 2000. Upon returning to his office on July 6, 2000, Petitioner's counsel (a sole practitioner) failed to request an additional extension to file the brief from the Court of Appeals.

Instead, on July 12, 2000, Petitioner's counsel "overnighted" the brief, record excerpts and a motion for leave to file those papers out of time to the Court of Appeals which received them on July 13, 2000.

Thereafter, the Clerk of the Court of Appeals entered a dismissal of Petitioner's appeal for want of prosecution for his counsel's failure to file the brief and record excerpts on time. Petitioner's motion for reconsideration, which was construed by the Court of Appeals as a motion to reinstate the appeal, was denied on October 5, 2000.

This case is legally and factually apposite to *Matute* where the Third Circuit held that an appeal should *not* be dismissed for counsel's failure to file a brief on time where appellant's counsel has experienced extraordinary and compelling personal circumstances akin to those present here. Thus, the Court of Appeals' decision in this case directly conflicts with the Third Circuit's opinion in *Matute*.

Similarly, other courts have held that counsel may be sternly criticized for not filing a timely brief and for possibly prejudicing

the rights of his client, but that the failure to file a timely brief is not a jurisdictional bar to hearing the appeal. *Marcaida v. Rascoe*, 569 F.2d 828 (5th Cir. 1978).

If it appears that a party is attempting to prosecute the appeal diligently, as Petitioner in this case had done prior to attempting to file his brief with the Court of Appeals (and since then), a failure to request an extension of time to file a brief should not automatically result in the dismissal of the appeal. *King v. Laborers International Union*, 443 F.2d 272 (6th Cir. 1971).

Moreover, Federal Rule of Appellate Procedure 31 recognizes that, while briefs must be filed within 40 days after the record on appeal is filed, the failure to file a brief on time is not a jurisdictional bar. *See Marcaida*, *supra*.

CONCLUSION

This case presents a question of significant importance — whether the Court of Appeals' peremptory dismissal of Petitioner's meritorious appeal for want of prosecution for his counsel's excusable failure to file a brief on time, where Petitioner attempted to file the brief seven days past the deadline, given his counsel's extraordinary and compelling personal circumstances, and where Respondent was not prejudiced by the short delay, conflicts with the Third Circuit's opinion in *Matute* and precedent in other circuits. In dismissing Petitioner's appeal, the Court of Appeals departed from established precedent in other circuits (and, by implication, in this Court) and deprived Petitioner of his constitutional right of appellate review.

Accordingly, Petitioner respectfully requests that his petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING MOTION TO REINSTATE APPEAL DATED AND FILED OCTOBER 5, 2000

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 00-12139-CC

MARIO JIMENEZ,

Plaintiff-Appellant,

versus

THE HIALEAH HOUSING AUTHORITY, a political subdivision of the City of Hialeah,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Florida

BEFORE: EDMONDSON and WILSON, Circuit Judges.

Appellant's Motion for Reconsideration of this Court's August 10, 2000 order denying Appellant's motion to set aside the clerk's dismissal and remedy default, which is construed as a Motion to Reinstate this Appeal, is DENIED.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING MOTION TO REINSTATE APPEAL DATED AND FILED AUGUST 10, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-12139-CC

MARIO JIMENEZ,

Plaintiff-Appellant,

versus

THE HIALEAH HOUSING AUTHORITY, a political subdivision of the City of Hialeah,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Florida

ORDER:

Appellant's Motion to "Set Aside Dismissal and Remedy Default", construed as a motion to reinstate the appeal, is denied.

s/ J.L. Edmondson
UNITED STATES CIRCUIT JUDGE

APPENDIX C — ENTRY OF DISMISSAL OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED JULY 26, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-12139-CC

MARIO JIMENEZ,

Plaintiff-Appellant,

versus

THE HIALEAH HOUSING AUTHORITY,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District Of Florida

ENTRY OF DISMISSAL

Pursuant to 11th Cir.R.42-2(c), this appeal is hereby dismissed for want of prosecution because appellant has failed to file an appellant's brief and record excerpts within the time fixed by the rules, effective this 26th day of July, 2000.

Appendix C

THOMAS K. KAHN
Clerk of the United States Court
of Appeals for the Eleventh Circuit

By: Jenifer Alexander
Deputy Clerk

FOR THE COURT —
BY DIRECTION

APPENDIX D — ORDER AND FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION DATED MARCH 21, 2000 AND FILED MARCH 22, 2000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 98-2779-CIV-DAVIS/BROWN

MARIO JIMENEZ,

Plaintiff,

v.

HIALEAH HOUSING AUTHORITY,

Defendant.

ORDER

THIS MATTER is before the Court on Defendant Hialeah Housing Authority's ("Defendant") Motion for Final Summary Judgment (filed November 29, 1999), to which Plaintiff has responded, Defendant replied, and Plaintiff has submitted a sur-reply brief.

I. BACKGROUND

Plaintiff Mario Jimenez ("Plaintiff") filed a Complaint on November 17, 1998, alleging civil rights violations under

the Americans With Disabilities Act, 42 U.S.C. § 12101 *et seq.* ("ADA") (Count I); the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("ADEA") (Count II); the Family and Medical Leave Act, 29 U.S.C. § 2601 *et seq.* ("FMLA") (Count III); due process violations pursuant to 42 U.S.C. § 1983 (Count IV); and violation of the Florida Whistleblower Act, Florida Statutes § 112.3187 (Count V).

Plaintiff is a fifty-eight year old Hispanic male. *See* Complaint ¶ 4. Defendant is a quasi-governmental entity existing under the laws of the State of Florida that provides low-income housing to disadvantaged and elderly residents of Hialeah. Plaintiff was employed by Defendant from October 29, 1979 until June 5, 1998 when he was discharged. *See id.* at ¶ 13, 30.

Defendant's Board of Commissioners, an exclusive body with authority to adopt or implement policies on behalf of Defendant, typically appoints an executive director to operate Defendant's day-to-day business. *See* Roca Aff. ¶ 2,3. Maria Roca ("Roca") is executive director for Defendant and was serving in this capacity when Plaintiff was terminated. *See id.* at ¶ 1.

On January 16, 1996, Plaintiff and approximately fifty-five (55) of Defendant's other employees sent a letter to the U.S. Department of Housing and Urban Development (the "HUD letter"), in which they objected to various acts of alleged political favoritism, corruption, and unfair treatment of Richard Fusaro, a co-worker employed by Defendant. *See* Complaint, ¶ 15.

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On January 6, 1998, almost two years later, Plaintiff received an evaluation indicating his job performance needed improvement in eight of ten areas. *See* Def. Depo. Exh. 27. Plaintiff was suspended for five days without pay on January 8, 1998. *See* Def. Depo. Exh. 23. In a letter attached to Plaintiff's grievance complaint based upon the suspension, Plaintiff stated he had been suspended due to his "support and friendship to Mr. Richard Fusaro." *See* Def. Depo. Exh. 25. Plaintiff also alleged that he was subjected to the suspension in retaliation for his participation in the HUD letter. *See* Complaint ¶ 25; Plaintiff's Depo, p. 12-13. More specifically, Plaintiff testified in his deposition that the suspension was in retaliation against him for having signed the HUD letter, for his failure to campaign for Mayor Raul Martinez, and because he testified before a grand jury in a matter related to Defendant's former director, Rafael Sanchez. *See* Plaintiff's Depo, p. 99-100.

Plaintiff also testified that he believed he was discriminated against because of his age and replaced by a younger person because he had heard someone refer to him as "viejo" or old guy. *See id.* at 33-34. Plaintiff, however, stated he could not remember who made the remark about age and only assumed it was directed at him. *See id.* at 36-38. Plaintiff could recall no other evidence supporting his allegations of age discrimination. *See id.* at 33-34.

Sometime in the fall of 1997, due in large part to work-related stress and hostility, Plaintiff suffered from depression and anxiety. *See* Complaint, ¶ 20-22. Plaintiff alleges that this depression and anxiety rendered him disabled under the Americans With Disabilities Act and that he had to take

medical leave from work based upon his condition. In the weeks following his return to work, Plaintiff alleges he suffered discriminatory treatment and was suspended because of his medical condition, his disability, and/or his taking time off from work. *See id.* at ¶ 23-25. Plaintiff also alleges that he was ultimately fired in June 1998 after returning from a second medical leave. Plaintiff, however, has admitted that he has no evidence that he was discharged based on a "disability" or his taking medical leave other than his receiving a poor evaluation after taking medical leave and receiving numerous performance-related memos from Roca. *See* Plaintiff Depo, p. 43-44.

On June 4, 1998, Roca delivered to Plaintiff a letter advising him that she was considering his termination based on his work performance. *See* Def. Depo. Exh. 36, On June 5, 1998, Roca and Plaintiff met to discuss Plaintiff's imminent termination, and following the meeting, Roca gave Plaintiff his notice confirming termination and advising him of his grievance rights. *See* Def. Depo. Exh. 38.

Plaintiff filed a Charge of Discrimination ("EEOC charge") with the Equal Employment Opportunity Commission ("EEOC") on June 10, 1998, alleging violations of the ADA and ADEA. *See* Def. Depo. Exh. 1. Specifically, he claimed he was terminated and suspended based on his age and/or purported disability. The EEOC issued Plaintiff a right to sue letter on August 19, 1998. Thereafter, Plaintiff filed this suit in November 1998.

Appendix D

Defendant argues that it is entitled to final summary judgment on Plaintiff's discriminatory discharge claims in Counts I and II[1], and on Counts III through VI in their entirety.

II. DISCUSSION

A. Standard of Review

A moving party is entitled to summary judgment only where no genuine issue of material fact exists and the party is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). On a motion for summary judgment, a court must view all the evidence in a light most favorable to the non-moving party. *See Samples ex rel. v. City of Atlanta*, 846 F.2d 1328, 1330 (11th Cir. 1988). All reasonable doubts as to the facts are to be resolved in favor of the party opposing summary judgment. *See United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1437 (11th Cir. 1988). If a reasonable fact finder evaluating the evidence could draw more than one inference from the facts, and if that inference introduces a genuine issue of material fact, the court should not grant summary judgment. *See Augusta Iron and Steel Works v. Employers Ins. of Wasau*, 835 F.2d 855, 856 (11th Cir. 1988).

While the burden on a party seeking summary judgment is great, the opposing party has a duty to present affirmative

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1. The Court previously entered partial summary judgment in favor of Defendant with respect to Count I's claims of harassment and hostile environment and Count II's claims for retaliation. *See* Court's Order of December 6, 1999.

evidence in order to defeat a properly supported motion for summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). A mere sliver of evidence in favor of the party opposing the motion, or evidence that is merely colorable or not significantly probative is insufficient to defeat a properly supported motion. *Id.*

B. The Merits

1. *Burden of Proof*

The Court notes as an initial matter that the burden of proof for Plaintiff's claims under the ADA, ADEA and FMLA are governed by the burden shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Graham v. State Farm Mutual Ins. Co.*, 193 F.3d 1274, 1282 (11th Cir. 1999). Initially, the plaintiff must establish a prima facie case of discrimination. Once plaintiff establishes a prima facie case, a presumption of discrimination arises. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993). Thereafter, the defendant can rebut the presumption of discrimination by producing a legitimate, nondiscriminatory reason for its actions. *Id.* This burden is exceedingly light, and the defendant need only proffer legitimate reasons, not prove them. *See Meeks v. Computer Assoc. Int'l.*, 15 F.3d 1013 (11th Cir. 1994). Once such reason is proffered, the plaintiff must then demonstrate that the reasons were simply a pretext and the defendant had a discriminatory intent. Plaintiff, however, is required at this point to provide additional evidence that discredits the employer's reasons in order to survive summary judgment. A mere scintilla of evidence in support of Plaintiff's position

will not create a jury question. *See Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436, 444 (11th Cir. 1996).

a. *Violations of the ADA*

First, Defendant contends it is entitled to summary judgment on Plaintiff's claims that he was terminated in violation of the ADA. In order to establish a prima facie case of disability discrimination, Plaintiff must demonstrate that he (1) is disabled;[2] (2) is qualified for the position in question; and (3) was subjected to unlawful discrimination because of his disability. *See* 42 U.S.C. § 12112(a); *Hilburn*, 181 F.3d at 1223.

After reviewing all of the evidence in this case, the Court concludes that Plaintiff has failed to demonstrate by preponderance of the evidence that he is disabled under the ADA. In fact, Plaintiff has not provided a single piece of evidence supporting his contention that he is disabled, apart from his own affidavit stating he was diagnosed as having depression and took medical leave as a result. While

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2. The ADA defines disability as (A) a physical or mental impairment that substantially limits one or more of the major life activities of an individual; (B) a record of such impairment; or (C) being regarded as having such impairment. *See* 42 U.S.C. § 12102(2). In evaluating whether an impairment substantially limits a major life activity, a court should consider: 1) the nature and severity of the impairment; 2) the duration of expected duration of the impairment; 3) the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment. *See* 29 C.F.R. § 1630.2.

depression can be a "serious and potentially tragic illness," it exists in degrees. *See Pritchard v. Southern Company Services*, 92 F.3d 1130, 1133 (11th Cir. 1996). The fact that Plaintiff may have suffered from depression, in and of itself, does not render him disabled under the ADA. *See id.*

Plaintiff has failed to demonstrate that his depression substantially limited his major life activities. Instead, the evidence suggests that he was simply unable to work at his particular job and/or for Maria Roca, his supervisor. Plaintiff's own affidavit provides: "largely because of work-related stress and hostility to which I was being subjected, I was medically diagnosed with severe depression and anxiety. . ." *See* Plaintiff Aff. ¶ 6. In his deposition testimony, Plaintiff stated that "[w]hat made me sick was the Housing Authority and Mrs. Maria Roca and Mr. Raul Martinez." *See* Plaintiff Depo., p. 82. There is no evidence that Plaintiff suffered from depression before or after the time he worked under Roca. *See* Scholz-Rubin Depo., p. 13. Instead, Plaintiff stated in his deposition that working under Roca was his primary problem and that he was only depressed during the time when Roca was allegedly harassing him at work. *See* Plaintiff Depo, p. 42, 76-78. Plaintiff also revealed that he no longer needs treatment for depression because "after [he] left the Housing Authority, [he] started to feel better" and was working in a much better environment. *See id.* at 76-78.[3]

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3. Plaintiff's doctors similarly suggest that Plaintiff's problems stemmed from his particular job and from working under Roca. Dr. Scholz-Rubin stated in her deposition that Plaintiff was depressed as a result of his job, and particularly his problems with a female

(Cont'd)

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An employee's depression and anxiety caused by working with a particular co-worker or supervisor is not disabling under ADA. *See Palmer v. Circuit Court of Cook County, Illinois*, 117 F.3d 351, 352 (7th Cir. 1997) (personality conflict with supervisor does not constitute disability even if it produces anxiety and depression); *Siemon v. AT&T Corp.*, 117 F.3d 1173, 1176 (10th Cir. 1997) (employee's depression brought on by working for a particular supervisor does not prevent employee from performing class of jobs or broad range of jobs in various classes); *Palelogos v. Rehab. Consultants, Inc.*, 990 F. Supp. 1460, 1464 (N.D. Ga. 1998) (stress, anxiety, and depression resulting from plaintiff's job and interaction with supervisors is not sufficient to constitute a disability). Because Plaintiff's depression in the instant case existed over the course of only a few months and coincided with stress relating to his particular job situation and his work for Roca, the Court concludes that there is no genuine issue of fact as to whether Plaintiff was disabled. Accordingly, Plaintiff has failed to establish his prima facie case and summary judgment on his ADA claims is granted.

(Cont'd)

supervisor. *See* Scholz-Rubin Depo., p. 8-14. Another doctor who treated Plaintiff concluded that Plaintiff suffered from an adjustive disorder where all individual exhibits a number of symptoms as a result of a particular stressful situation. In Plaintiff's situation, his symptoms were brought about by problems at his job and with his supervisor. *See* Rodriguez Depo., p. 11 A third doctor who examined Plaintiff noted that Plaintiff appeared anxious and depressed about work, but stated that he was unaware of any activities which Plaintiff could not do because of his depression. *See* Dr. Garcia-Romeu Depo., p. 8-9, 11-12, 14.

Furthermore, even if the Court assumed that Plaintiff met each of his prima facie burdens under the ADA, summary judgment would still be appropriate. Defendant has provided numerous legitimate, non-discriminatory justifications for suspending and firing Plaintiff. For instance, several affiants indicated that Plaintiff often failed to properly address issues that arose for Defendant's tenants and allowed numerous letters and phone calls from tenants to go unanswered. *See* Mursuli, ¶ 3; Binelo Aff. ¶ 3. In addition, HUD's Inspector General recommended that a program under Plaintiff's supervision be reviewed due to a large number of errors and problems with the program. *See* Plaintiff's Depo., p. 111-112. Plaintiff also concedes that he failed to complete certain assignments as instructed by his supervisor. *See* Plaintiff Depo., p. 125-129. Numerous employees complained or offered testimony that Plaintiff routinely yelled and treated employees in an abusive and unprofessional manner. *See* Roca Aff. ¶ 6; Binela Aff. ¶ 4; Gutierrez Aff. ¶ 2; Mursuli Aff. ¶ 4; and Garcia Aff. ¶ 3. There is also evidence that Plaintiff made threats that he would "take a bunch of you with me" if he was fired. *See* Mursuli Aff. ¶ 6. Plaintiff has offered no evidence other than his own affidavit to demonstrate that the Defendant's reasons for suspending or discharging him were pretextual for disability discrimination. Plaintiff's conclusory allegations that he believes he was subjected to discrimination are simply insufficient to raise an inference of discrimination in the face of legitimate, non-discriminatory justifications by his employer. *See Terrell v. USAir*, 132 F.3d 621, 625 (11th Cir. 1998).

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b. *Violations of the ADEA*

A plaintiff establishes a prima facie case of age discrimination by demonstrating: (1) he was a member of a protected class of person between age forty and seventy; (2) he was qualified for the position he held; (3) he was subject to an adverse employment action; and (4) that a substantially younger person filled his position. *See Turlington v. Atlanta Gas & Light Co.*, 135 F.3d 1428, 1432 (11th Cir.), *cert. denied*, 119 S. Ct. 405 (1998). Even assuming arguendo that Plaintiff has established a prima facie case of age discrimination, summary judgment is appropriate because Plaintiff has provided no evidence to show that the legitimate, non-discriminatory justifications for firing Plaintiff discussed in the previous section were pretext for age discrimination.

Plaintiff cannot simply rely on his argument that he was replaced by a younger person to show pretext because that is part of his prima facie case. As noted previously, when confronted with a legitimate, non-discriminatory justification for an employment action, a Plaintiff must come forward with additional facts to allow a jury to find that the defendant's proffered reasons were pretextual. *See Tidwell v. Carter Products*, 135 F.3d 1422 (11th Cir. 1998). When asked what additional evidence Plaintiff had that he was discharged because of his age, Plaintiff stated that he overheard someone call him "viejo," which translates to "old guy." *See* Plaintiff's Depo., p. 33-37. Nevertheless, Plaintiff was unable to identify who called him "viejo" and only assumed that the speaker was referring to Plaintiff. *See* Plaintiff's Depo., p. 33-37. Plaintiff admitted that he had no other evidence to support his claim for age discrimination. *See* Plaintiff's Depo., p. 42.

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Plaintiff's allegations are insufficient as a matter of law to support his claim for discrimination under the ADEA. *See Early v. Champion Int'l. Corp.*, 907 F.2d 1077, 1080 (11th Cir. 1990) (evidence that is merely colorable or not significantly probative is insufficient to withstand a properly supported motion for summary judgment). Accordingly, summary judgment is appropriate.

c. *Violations of the FMLA*

Count III of the Plaintiff's Complaint sets forth allegations that Defendant violated the FMLA. There are two types of claims that can be maintained under the FMLA. First, an employee has an interference claim when an employer burdens or outright denies substantive statutory rights to which the employee is entitled under the FMLA. *See O'Connor v. PCA Family Health Plan, Inc.*, 2000 WL 33166, *2 (11th Cir. 2000) (*citing* 29 U.S.C. § 2615(a)(1)). Second, an employee may raise a retaliation claim he or she is discharged or discriminated against for exercising his rights under the FMLA. *See id.* Because Plaintiff's Complaint does not specify which type of claim he is pursuing, the Court addresses whether Plaintiff has raised a genuine issue of material fact as to either. *See id.* (district court erred in not considering both types of FMLA claims in considering whether employer violated FMLA).

i. FMLA Interference Claim

First, the Court addresses Plaintiff's claim for interference under the FMLA. To prevail on an interference claim, an employee must prove by preponderance of the

evidence that he or she is entitled to the benefit she claims and that an employer interfered with or denied that benefit. *See O'Connor v. PCA Family Health Plan, Inc.*, 2000 WL 33166 (11th Cir. 2000). The Eleventh Circuit has recognized that denial of reinstatement following an employee's leave of absence can form the basis of an interference claim. *See id.* at *3.

Plaintiff claims that he was denied this statutory right to reinstatement upon his attempt to return from leave on June 2, 1998. *See* Plaintiff's Aff. ¶ 14. In support, Plaintiff offers only his conclusory affidavit stating that he attempted to return to work on June 2, but was not permitted to do so. Defendant counters that Plaintiff was, in fact, reinstated on June 1, 1998. In support, Defendant has provided its payroll records reflecting that Plaintiff was paid for the entire week of June 1, 1998 through June 5, 1998. *See* Vallardes Aff. ¶ 3. In addition, Defendant offers the Plaintiff's supervisor's affidavit stating that Plaintiff returned to work on June 1, 1998. *See* Roca Supp. Aff. ¶ 2.

The Court concludes that Plaintiff has failed to raise a genuine issue of fact as to whether he was denied his right to reinstatement under the FMLA. Plaintiff cannot merely rest on his affidavit's conclusory allegations to defeat Defendant's properly supported summary judgment motion. *See Terrell*, 132 F.3d at 625 (conclusory allegations lacking corroboration will not defeat a motion for summary judgment); *Evans v. Technologies Applications & Service Co.*, 80 F.3d 954, 962 (4th Cir. 1996) (stating summary judgment affidavits cannot be conclusory, and self-serving opinions without corroboration are not significantly probative).

Furthermore, even if Plaintiff had raised an issue of fact as to whether he was reinstated, be apparently suffered no harm from any alleged denial of his right to reinstatement because he received his entire twelve weeks of medical leave and was paid in a manner consistent with having been reinstated on June 1, 1998. *See Graham*, 193 F.3d at 1275 (plaintiff has no FMLA injury when he receives all of the leave he requests); *O'Connor*, 2000 WL 33166 at *6. Because the Court concludes that Plaintiff has failed to raise a genuine issue of fact on his claim that Defendant interfered with his rights under the FMLA, summary judgment in favor of Defendant is appropriate.[4]

ii. FMLA Retaliation Claim

Next, the Court addresses Plaintiff's allegation that his discharge was discriminatory and/or retaliatory for his having exercised his rights under the FMLA. Plaintiff contends that

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4. As further support for the legitimacy of its decision to fire Plaintiff after his reinstatement, Defendant again offers its numerous legitimate, non-discriminatory justifications for firing Plaintiff. Although Plaintiff correctly notes that Plaintiff need not prove discriminatory intent for an FMLA interference claim, Defendant's reasons for firing Plaintiff are relevant insofar as they suggest that Plaintiff would have been fired whether he had taken medical leave or not. *See Clark v. New York State Electric & Gas Corp.*, 67 F.Supp.2d 63 (N.D.N.Y. 1999) (FMLA does not entitle employee taking leave to any greater rights than if he not taken leave, and FMLA does not insulate an employee from performance deficiencies); *Clay v. City of Chicago Dept. of Health*, 143 F.3d 1092 (7th Cir. 1998) (employer did not violate FMLA by not reinstating employee when employer could have fired employee for performance reasons even if she had not taken leave).

he was expected back from his medical leave on June 2, 1998, but that Defendant refused to allow him back to work. Then, on June 5, 1998, Defendant terminated Plaintiff's employment with Defendant.

Congress clearly contemplated that retaliation and discrimination claims under the FMLA should be analyzed under the McDonnell Douglas burden shifting framework. *See Graham*, 193 F.3d at 1283. For purposes of this analysis, the Court assumes that Plaintiff has established a prima facie case of discrimination/retaliation under the FMLA.[5] Nevertheless, as discussed in the previous sections addressing Plaintiff's claims under the ADA and ADEA, Defendant has offered a legitimate, nondiscriminatory justification for terminating Plaintiff's position. Plaintiff has failed to rebut Defendant's explanation or to demonstrate that it was mere pretext for discrimination or retaliation under the FMLA.

When asked what evidence formed the basis of Plaintiff's claim that he was fired for taking medical leave, Plaintiff merely stated that he did not know, but maybe it was "because [he] was a sick person, because [he] took so many days." *See* Plaintiff's Depo., p. 84. Plaintiff also states that he received a letter telling him that he was only entitled to twelve

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5. To establish a prima facie case, a plaintiff must demonstrate that 1) he availed himself of a protected right under the FMLA; 2) he was adversely affected by an employment decision; 3) there is a causal connection between the protected activity and adverse employment action; and 4) he was qualified for his position at the time of the adverse employment action. *See Stanfield v. Answering Service, Inc.*, 867 F.2d 1290, 1293 (11th Cir. 1989).

weeks of medical leave. *See id.* at 86. Plaintiff offered no other testimony or evidence supporting his claim that he was discriminated against for taking medical leave. In fact, Plaintiff went on to say in his deposition that he thought that he was fired mainly because of his signing the HUD letter and speaking out in the office. *See id.* at 83-84.

Because Plaintiff has failed to offer any evidence that Defendant's reason for firing him was mere pretext for discrimination, Defendant is entitled to summary judgment on Plaintiff's claim that his discharge was discriminatory and retaliatory for his having exercised his rights under the FMLA.

d. *Violations of 42 U.S.C. § 1983*

Count IV of Plaintiff's Complaint alleges that Defendant violated 42 U.S.C. § 1983 by discharging Plaintiff in retaliation for Plaintiff having exercised his rights to freedom of speech and expression. Specifically, Plaintiff claims that Defendant retaliated against him for signing the HUD letter back in January 1996 that complained of fiscal mismanagement and political favoritism by certain of Defendant's employees. *See* Complaint, ¶ 62-64; Response to Summary Judgment Motion, p. 2-3. Plaintiff has failed to raise an issue of fact as to whether he is entitled to relief under 42 U.S.C. § 1983.

In order to establish a claim for retaliation under § 1983, Plaintiff must demonstrate that his participation in protected activity was the "substantial and motivating factor" in the Defendant's decision to terminate his employment. *See Watkins v. Bowden, Jr.*, 105 F.3d 1344, 1353 (11th Cir.

1997). This standard presupposes that the person who discharged Plaintiff knew that Plaintiff was engaged in protected activity. *See Raney v. Vinson Guard Service, Inc.*, 120 F.3d 1192 (11th Cir. 1997). If the individual who discharged Plaintiff did not know of Plaintiff's participation in protected activity, it is difficult to see how the participation would have been the substantial and motivating factor behind that individual's decision.

In the instant case, Ms. Roca, who ultimately discharged Plaintiff, testified under oath that she did not know of Plaintiff's participation in the HUD letter. *See* Roca Aff. ¶ 4. Plaintiff's February 7, 2000 affidavit does not contradict Roca's allegation that she was unaware of Plaintiff's participation in the HUD letter. Nor, as Plaintiff suggests, does the affidavit state that Roca threatened anyone who signed the HUD letter. Plaintiff has failed to cite to any other evidence in the record that raises an issue of fact as to whether Roca was aware that Plaintiff signed the HUD letter.[6]

Furthermore, even if Roca was aware that Plaintiff signed the HUD letter, Plaintiff has failed to raise an issue of fact as to whether that action motivated Roca's decision to discharge Plaintiff. More than 29 months elapsed between

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6. Plaintiff also argues that Roca's awareness of Plaintiff's participation in the HUD letter is evidenced by affidavit and deposition testimony submitted in a related case before Judge Moore, and that this Court should take judicial notice of such evidence. The Court, however, declines Plaintiff's invitation to dig through unspecified portions of the record in a separate case to find evidence to support Plaintiff's position in this case. Plaintiff was free to offer such evidence in support of his position and failed to do so.

the date he signed the letter and his ultimate discharge. This substantial lapse of time clearly factors against Plaintiff's argument that his participation in the HUD letter caused or motivated his discharge almost two and a half years later. *See Maniccia v. Brown*, 171 F.3d 1364 (11th Cir. 1999) (15-month lag time between plaintiff's grievance and alleged adverse employment action belies assertion that the former caused the latter); *O'Connor v. Chicago Transit Auth.*, 985 F.2d 1362, 1370 (7th Cir. 1993) (9-month gap between activity and adverse employment action precluded inference of causation); *Causey v. Balog*, 162 F.3d 795, 803 (4th Cir. 1998) (13-month delay was too long for causation to be established).

Finally, Plaintiff has also failed to demonstrate that his alleged retaliatory termination for engaging in First Amendment activities occurred pursuant to a custom or policy of the Defendant. It is well established that a governmental entity cannot be held liable for violations of 42 U.S.C. § 1983 based upon respondeat superior. *See Monell v. Dept. of Social Services*, 436 U.S. 658 (1978). On the contrary, government entities are only liable when their official policies cause their employees to violate another's constitutional rights. *See City of St. Louis v. Praprotnik*, 485 U.S. 112, 122 (1988).

Plaintiff has offered no credible evidence that Defendant has any kind of custom or policy of retaliation against those who exercise free speech to criticize perceived abuses by Defendant or its employees. In fact, Plaintiff does not even respond to the portion of Defendant's Motion for Summary

Judgment addressing the clear lack of policy or custom.[7] Accordingly, summary judgment is appropriate on Plaintiff's claims for retaliatory discharge under 42 U.S.C. § 1983.

e. *Violation of Florida Statute § 112.3187*

Finally, Count V of Plaintiff's Complaint alleges that Plaintiff was discharged for his participation in the HUD letter in violation of Florida Statute § 112.3187 ("the Florida Whistleblower Act"). Defendant alleges that it is entitled to summary judgment on Plaintiff's Whistleblower claim because Plaintiff failed to disclose the purported protected information to the proper authorities.

Section 112.3187(6), Fla. Stat., provides that where a person reports alleged violations of the law by a local government entity, a plaintiff *must* disclose the information "to a chief executive officer as defined in § 447.203(9)[8] or an appropriate *local* official." There is no dispute that the

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7. In a related case, *Fusaro v. Hialeah Housing Authority*, 97-2732-CIV-MOORE (January 11, 1999), Judge Moore similarly concluded that there was no evidence that Defendant had a policy or custom of taking action against individuals who participated in the HUD letter or against individuals who exercised any other First Amendment rights.

8. A chief executive officer for a public employer is "the person, whether elected or appointed, who is responsible to the legislative body of the public employer for the administration of the governmental affairs of the public employer." Section 447.203(9), Florida Statutes. Legislative body means the governing body of an instrumentality or unit of government having authority to appropriate funds and establish policy. Section 447.203(10).

complaints raised in the HUD letter that Plaintiff participated in were directed at Defendant, a local government entity. Thus, the clear language of the Whistleblower Act requires that complaints or disclosures about the local entity be made to either a chief executive officer of Defendant's governing body or other appropriate *local* official.

The HUD letter, however, was not sent to any local individual or entity; rather, it was sent only to HUD, a federal agency. Plaintiff has offered no argument as to why the complaint to a federal agency satisfies the disclosure requirements of the Whistleblower Act. Because Plaintiff has failed to satisfy the reporting and disclosure requirements under the Florida Whistleblower Act, Plaintiff's claim must fail. *See Kelder v. ACT Corp.*, 650 So. 2d 647 (Fla. 5th DCA 1995) (plaintiff must disclose wrongdoing to appropriate officials). For all the foregoing reasons, it is

ORDERED AND ADJUDGED that Defendant's Motion for Summary Judgment is GRANTED. This Case is CLOSED. The Clerk of this Court is directed to mark this case CLOSED. All pending motions not previously ruled on are DENIED as moot.

DONE AND ORDERED in Chambers, in Miami, Florida this 21st day of March, 2000.

s/ Edward B. Davis
EDWARD B. DAVIS
CHIEF UNITED STATES
DISTRICT JUDGE

Appendix D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 98-2779-CIV-DAVIS/BROWN

MARIO JIMENEZ,

Plaintiff,

v.

HIALEAH HOUSING AUTHORITY,

Defendant.

FINAL JUDGMENT

THIS MATTER is before the Court on its own initiative. By separate Order this Court granted final summary judgment in favor of Defendant. Accordingly, it is

ORDERED AND ADJUDGED that **FINAL JUDGMENT** is entered in favor of Defendant Hialeah Housing Authority and against Plaintiff Mario Jimenez. Plaintiff is not entitled to any recovery.

LET EXECUTION ISSUE.

DONE AND ORDERED in Chambers, in Miami, Florida this 21st day of March, 2000.

s/ Edward B. Davis
EDWARD B. DAVIS
CHIEF UNITED STATES
DISTRICT JUDGE

Supreme Court, U.S.
FILED
APR 4 2001
CLERK

No. 00-1398

IN THE

Supreme Court of the United States

MARIO JIMENEZ,

Petitioner,

v.

HIALEAH HOUSING AUTHORITY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Was the Court of Appeals' discretionary decision to dismiss the appeal below for failure to comply with the court's scheduling order and established appellate procedures — after petitioner previously requested and obtained an enlargement of the deadline for filing his brief — in conflict with a precedent of the United States Supreme Court or that of another Circuit Court of Appeals such that a compelling reason exists for this Court to exercise its discretion and issue a writ of certiorari to review this matter?

PARTIES TO THE PROCEEDING

The parties to the proceeding are Mario Jimenez ("Jimenez") and the Hialeah Housing Authority ("Authority"). Jimenez's description of the Authority as a "political subdivision of the City of Hialeah, Florida" is incorrect. The Authority is an independent, quasi-governmental entity created pursuant to Chapter 421, Fla. Stat.

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STATEMENT OF JURISDICTION

On October 5, 2000, the United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit") rendered its final judgment below when it denied Jimenez's motion for reconsideration of its August 10, 2000 order denying Jimenez's motion to set aside the clerk's dismissal, which motion the Eleventh Circuit construed as a motion to reinstate the appeal. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RULES OF APPELLATE PROCEDURE AT ISSUE

FED. R. APP. P. 31(c). Serving and Filing Briefs

> (c) *Consequences of Failure to File.* If an appellant fails to file a brief within the time provided by this rule, or within an extended time, an appellee may move to dismiss the appeal. An appellee who fails to file a brief will not be heard at oral argument unless the court grants permission.

11TH CIR. R. 31-2 Briefs and Record Excerpts in a Civil Appeal — Motion to Extend Time or to File Out of Time.

* * *

> (b) *First Request for an Extension of Time.* A party's first request for an extension of time to file a brief or record excerpts, or to correct a deficiency in a brief or record excerpts, must set forth good cause. A first request for an extension of seven calendar days or less may be made by

telephone or in writing, and may be granted by the clerk. A first request for an extension of more than seven calendar days must be made by written motion setting forth with particularity the facts demonstrating good cause, and will only be acted upon by the court. When a briefing schedule has been established by court order, a first request for an extension must be made by written motion and will only be acted upon by the court.

* * *

(d) *Second Request for an Extension of Time.* Second requests for an extension of time to file a brief or record excerpts, or to correct a deficiency in a brief or record excerpts, are extremely disfavored and are granted rarely. A party's second request for an extension will be granted only upon a showing of extraordinary circumstances that were not foreseeable at the time the first request was made. A second request must be made by written motion and will only be acted upon by the court.

(e) *Extension of Time Must be Requested Prior to Due Date.* A request for an extension of time to file a brief or record excerpts pursuant to this rule must be made or filed prior to the expiration of the due date for filing the brief or record excerpts. The clerk is without authority to file a party's motion for extension of time to file a brief or record excerpts received by the clerk after the expiration of the due date for filing the brief or record excerpts. A request for an extension of time to correct a deficiency in a brief or record excerpts

pursuant to this rule must be made or filed within 14 days of the clerk's notice as provided in 11th Cir. R. 42-3. The clerk is without authority to file a party's motion to correct a deficiency in a brief or record excerpts received by the clerk after the expiration of the 14-day period provided by that rule. [See 11th Cir. R. 42-2 and 42-3 concerning dismissal for failure to prosecute in a civil appeal.]

* * * *

11TH CIR. R. 42-2 ***Dismissal in a Civil Appeal for Appellant's Failure to File Brief or Record Excerpts by Due Date.***

* * *

(c) *Dismissal Without Further Notice.* When an appellant has failed to file the brief or record excerpts by the due date as established by 11th Cir. R. 31-1 and set forth in the clerk's notice, or if the due date has been extended by the court, within the time so extended, an appeal shall be treated as dismissed for failure to prosecute on the first business day following the due date. The clerk thereafter will enter an order dismissing the appeal and mail a copy of that order to counsel and pro se parties.

* * *

(e) *Motion to Set Aside Dismissal and Remedy Default.* An appeal dismissed pursuant to this rule may be reinstated only upon the timely filing of a motion to set aside the dismissal and remedy the

> default showing extraordinary circumstances, accompanied by the required brief and record excerpts. Such a motion showing extraordinary circumstances, accompanied by the required brief and record excerpts, must be filed within 14 days of the date the clerk enters the order dismissing the appeal. The timely filing of such a motion, accompanied by the required brief and record excerpts, and a showing of extraordinary circumstances, is the exclusive method of seeking to set aside a dismissal entered pursuant to this rule. An untimely filed motion to set aside dismissal and remedy default must be denied unless the motion demonstrates extraordinary circumstances justifying the delay in filing the motion, and no further filings shall be accepted by the clerk in that dismissed appeal.

* * * *

CONCISE STATEMENT OF THE CASE

On April 20, 2000, Jimenez timely filed a notice of appeal from the final summary judgment entered against him by the U.S. District Court for the Southern District of Florida on March 21, 2000 in the case styled *Mario Jimenez v. Hialeah Housing Authority*, Case No. 98-2779-CIV-DAVIS. App. D. On May 26, 2000, eleven days prior to the original deadline for filing his initial brief, Jimenez requested a 30-day extension of time in which to file his initial brief on the merits of his appeal. *See* Supp. App. A.[1] In support of his request for a 30-day

1. A supplemental appendix (Supp. App.) is required in order provide the Court with additional documentation from the record, omitted by Jimenez, but which is otherwise needed to evaluate Jimenez's petition.

extension of time, Jimenez cited to his counsel's illness. *Id.* The Eleventh Circuit granted Jimenez's request and set a July 6, 2000 deadline for Jimenez to file his initial brief. Supp. App. B.

Jimenez failed to comply with the Eleventh Circuit's July 6, 2000 deadline for filing his initial brief. Instead, Jimenez filed his brief on July 13, 2000, with an accompanying "unopposed" motion for leave to file the brief out of time. Supp. App. C. In actuality, Jimenez acknowledged in a subsequent pleading that counsel for the Authority had never agreed to Jimenez's filing of the initial brief seven days out of time. Supp. App. D at 4. In fact, counsel for Jimenez acknowledged that he never called counsel for the Authority after the July 6, 2000 deadline to indicate that the initial brief would be one week late. Supp. App. D at 3.

On July 26, 2000, the Clerk of the Eleventh Circuit dismissed Jimenez's appeal for want of prosecution. App. C. On July 28, 2000, Jimenez filed a motion to set aside dismissal and remedy default. Supp. App. E. In this motion, Jimenez again referred to his counsel's illness and noted that, at or about the time of the *original* request for extension of time, his counsel had unsuccessfully attempted to associate with co-counsel to assist in the preparation of the initial brief. *Id.* at 2. No indication is given in the motion that Jimenez ever again petitioned the Eleventh Circuit for relief from the briefing deadline *prior* to its expiration. On August 10, 2000, the Eleventh Circuit, through Circuit Judge James Edmonson, denied Jimenez's motion to set aside the dismissal and reinstate the appeal. App. B.

On August 22, 2000, Jimenez filed a motion for reconsideration of the August 10, 2000 decision denying his prior motion to set aside the dismissal and requested reinstatement of the appeal. As noted above, the Eleventh Circuit denied the motion for reconsideration on October 5, 2000.

REASONS FOR DENYING THE WRIT

THE ELEVENTH CIRCUIT'S DECISION BELOW, WHICH RELATED TO THE JUDICIAL ADMINISTRATION OF ITS OWN DOCKET, DOES NOT GIVE RISE TO A CONFLICT WITH A PRECEDENT OF THIS COURT OR THAT OF ANY OTHER COURT OF APPEALS.

This Court grants petitions for writ of certiorari only for "compelling reasons." Sup. Ct. R. 10. Generally, a petition will be granted only when the petitioner demonstrates that the ruling rendered by the court of appeals in question: (a) conflicts with that of another court of appeals on the same important matter; or (b) conflicts with relevant decisions of this Court. Sup. Ct. R. 10(a) and (c).[2] "A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

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2. Supreme Court Rule 10 cites to other bases for granting a petition for writ of certiorari, but those bases are inapplicable under the facts of this case. Jimenez appears to base his petition on the purported existence of a conflict with precedent. Petition at 5. Jimenez does not articulate a particular, important question of federal law that has not been, but should be, settled by this Court; nor does he advocate that the Eleventh Circuit's decision so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

A. The Eleventh Circuit's Decision Below Does Not Give Rise to a Conflict with a Decision of Another Court of Appeals.

Jimenez has failed to demonstrate that the Eleventh Circuit's decision to administer its docket in the manner it did by refusing to reinstate his appeal conflicts with the precedents of another court of appeals regarding the same important matter. In this particular instance, Jimenez's counsel, according to his own assertions, was aware of his illness and the consequences that might result from it since the time he filed the notice of appeal. In fact, Jimenez requested and obtained a 30-day extension of time to file his initial brief. During this extension and the period before, Jimenez was presumably diligently prosecuting his appeal. In his motion to reinstate the appeal, Jimenez acknowledged that his counsel was aware of his condition during the period of extension and attempted to associate with co-counsel to assist in the preparation of the initial brief. Supp. App. E, at p. 2. Despite failing to obtain the assistance of co-counsel, Jimenez never petitioned the Eleventh Circuit prior to the expiration of the extended deadline to obtain an additional extension of time.

Rule 31-2(e) of the Eleventh Circuit specifically requires that any requests for extension of time to file a brief "must be made or filed prior to the expiration of the due date for filing the brief. . . ." Jimenez failed to comply with this rule, choosing instead to file his initial brief in belated fashion and request that the Eleventh Circuit accept it "out of time."[3]

3. Jimenez asserts that his counsel made a mistake in relying upon a prior rule of the Eleventh Circuit that permitted briefs to be filed "out of time." Supp. App. F at 2. However, in December 1999, (Cont'd)

Significantly, Jimenez *never* explains why his counsel, assuming he had been incapacitated from July 1-6, 2000, failed to petition the Eleventh Circuit for relief from the briefing deadline when he learned that he would not be able to meet it. Instead, Jimenez waited an additional seven days to file his brief and then improperly informed the court that his belated filing was "unopposed" by the Authority.

Each court of appeals that has addressed the issue has recognized its inherent power to administer and regulate its docket and take appropriate action with respect to those practitioners and parties who fail to comply with the court's procedural rules. *See, e.g.*, *Reyes-Garcia v. Rodriguez & Del Valle, Inc.*, 82 F.3d 11 (1st Cir. 1996) (party's noncompliance with appellate rules constitutes sufficient cause to dismiss appeal); *Wrighten v. Glowski*, 232 F.3d 119 (2d Cir. 2000) (dismissing appeal for failure to provide portions of record after extension of time); *Brooks v. Fitch*, 642 F.2d 46 (3d Cir. 1981) (appeal dismissed for failure to comply with appellate procedures); *Louisiana World Exposition, Inc. v. Logue*, 746 F.3d 1033 (5th Cir. 1984) (dismissal of appeal for failure to file timely brief is within appellate court's discretion); *Morales v. American Honda Motor Co., Inc.*, 151 F.3d 500 (6th Cir. 1998) (failure to comply with appellate procedural requirements may result in dismissal of appeal); *United States v. Sosa*, 55 F.3d 278 (7th Cir. 1995) (failure to file a timely brief is grounds for dismissing appeal); *Slack v. St. Louis County Government*, 919 F.2d 98 (8th Cir. 1990)

(Cont'd)
the Eleventh Circuit admonished members of its bar to take special notice of that court's new *more stringent* requirements for obtaining extensions of time and the consequences for failing to abide by those requirements. A copy of the Eleventh Circuit's notice to practitioners is included at Supp. App. G.

(appeals that fail to comply with appellate rules governing briefs are subject to dismissal); *Guam Sasaki Corp. v. Diana's Inc.*, 881 F.2d 713 (9th Cir. 1989) (appellate court has discretion to dismiss appeal for failure to abide by court's rules); *United States v. Hanks*, 24 F.3d 1235 (10th Cir. 1994) (appeal dismissed for failure to comply with non-jurisdictional filing deadline); *LaParade v. Kidder Peabody & Co.*, 1997 WL 529072 (D.C. Cir. 1997) (appeal dismissed for failure to timely file brief or motion for extension of time); *Julien v. Zeringue*, 864 F.2d 1572 (Fed. Cir. 1989) (failure to comply with requirements for filing briefs may result in dismissal of appeal).

The court of appeals decisions relied upon by Jimenez do not give rise to a conflict with the decision below. First, none of the cases cited by Jimenez was decided subsequent to the Eleventh Circuit's notification to practitioners of its adoption of more stringent requirements for requesting and obtaining extensions of time. Second, the fact that various courts of appeals have expressed a preference for resolving appeals on the merits, rather than on "mere technicalities," does not deprive the Eleventh Circuit of the authority to administer its own docket and require parties to comply with filing deadlines, particularly extended deadlines that the party requested and obtained. In *Jones v. Chaney & James Const. Co.*, 399 F.3d 84 (5th Cir. 1968), the court simply concluded that a technical defect in the form of the *notice of appeal* did not *require* dismissal since the form was the functional equivalent of what was required by the rule.[4] In *Morrison v. Texas Co.*,

4. Additionally, it should be noted that *Jones* is a binding precedent of the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (*en banc*) (adopting pre-1981 Fifth (Cont'd)

289 F.2d 382 (7th Cir. 1961), the Seventh Circuit noted that an appendix to a brief that substantially complies with the requirements of the rule does not *require* dismissal of the appeal. *Id.* at 385.[5] Neither *Jones* nor *Morrison* is particularly instructive in this case.

Jimenez's reliance on *Marcaida v. Rascoe*, 569 F.2d 828 (5th Cir. 1978) and *Tidwell v. Dees*, 464 F.2d 1297 (5th Cir. 1967) is similarly misplaced, since both cases are precedents *within* the Eleventh Circuit and neither case gives rise to a conflict with the decision below. In *Marcaida*, the court simply held that the failure to file a timely brief is not a jurisdictional bar that requires dismissal of an appeal in each instance. *Marcaida*, 569 F.2d at 830. In *Tidwell*, not only does the opinion fail to give rise to a conflict, the court specifically affirmed the proposition that a court of appeals has the discretion under FED. R. APP. P. 31 to dismiss an appeal for failure to file a timely brief. *Tidwell*, 464 F.2d at 1297-98.

(Cont'd)
Circuit decisions are binding precedent). The Eleventh Circuit noted no conflict with *Jones* and petitioner argued no such conflict below. Any conceivable conflict intra-circuit should more efficiently be resolved by the Eleventh Circuit *en banc* and not by this Court. *Taylor v. United States*, 493 U.S. 906, 110 S. Ct. 265 (1989) ("Because the petition does not identify any *inter-Circuit* conflict concerning the question presented . . . the Court's denial of certiorari today is entirely consistent with rules governing the management of our certiorari docket." [emphasis in the original])

5. Moreover, the Seventh Circuit has since made it clear that dismissal of an appeal is appropriate for failure to timely file a brief. *Sosa*, *supra*.

Finally, Jimenez's reliance on an alleged conflict between the decision below and the Sixth Circuit's decision in *Matute v. Procoast Navigation, Ltd.*, 928 F.2d 627 (3d Cir. 1991), *cert. denied*, 502 U.S. 919, 112 S. Ct. 329 (1991), is unavailing.[6] In *Matute*, which is factually inapposite, the Third Circuit recognized that a court of appeal has the discretion *not* to dismiss an appeal if "extraordinary and compelling circumstances" are established.[7] Jimenez admits that his counsel, upon returning from his illness on the deadline for filing the brief, failed to request an additional extension of time from the Eleventh Circuit. Petition at 4. Instead, Jimenez's counsel remained silent and waited an additional week to file the brief out of time. Jimenez's counsel should have been aware of the procedural requirements of the Eleventh Circuit and complied with them. *See Pinion v. Dow Chemical*, 928 F.2d 1522, 1533 (11th Cir. 1991) (counsel has a duty to familiarize himself with the appellate rules); *see also FHC Equities, L.L.C. v. MBL Life Assurance Corp.*, 188 F.3d 678, 684-687 (6th Cir. 1999) (attorney error in interpreting federal rules does not constitute excusable neglect).

---

6. Jimenez's assertion that this Court has, by *implication* and denial of certiorari, approved the holding in *Matute* is entirely improper. Petition at 3. As Justice Frankfurter noted, "The Court has stated again and again what the denial of a petition for writ of certiorari means and more particularly what it does not mean. Such a denial, as has been repeatedly stated, 'imports no expression of opinion upon the merits of the case.' [citations omitted]" *Agoston v. Commonwealth of Pennsylvania*, 340 U.S. 844, 71 S. Ct. 9 (1950).

7. The Eleventh Circuit has adopted this standard. *See* 11TH CIR. R. 42-2(e). Since the Eleventh Circuit's standard is consistent with that of the Sixth Circuit, as articulated in *Matute*, no conflict arises. *See also* Sup. Ct. R. 10 ("A petition for writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.")

B. The Eleventh Circuit's Decision Below Does Not Conflict with a Precedent of this Court.

This Court has specifically recognized the authority of a court of appeals to dismiss an appeal for failure of a party to comply with a scheduling order established by the court of appeal. *Thomas v. Arn*, 474 U.S. 140, 146-147, 106 S. Ct. 466, 470-471 (1985). More generally, the Court has also acknowledged the discretion of a court of appeals to dismiss an appeal for want of prosecution. *Link v. Wabash R. Co.*, 370 U.S. 626, 633, 82 S. Ct. 1386, 1390 (1962).

In his conclusion, Jimenez does not appear to argue that the Eleventh Circuit's decision below conflicts with a precedent of this Court. Instead, he suggests that a conflict arises because of some undisclosed precedent adopted by implication by the Court. Petition at 5. As noted in footnote 6, *supra*, no implication can be derived from the Court's denial of certiorari in *Matute*. Since Jimenez presents no other argument regarding an alleged conflict between the decision below and a precedent of this Court, certiorari should not be granted on this basis.[8]

---

8. Jimenez cites in passing to *Foman v. Davis*, 371 U.S. 178, 83 S. Ct. 227 (1962) for the proposition that appeals should be decided, when possible, on the merits rather than on technicalities. Petition at 3. This holding does not conflict with the Eleventh Circuit's decision to enforce its procedural rules and dismiss Jimenez's appeal for failure to file a timely brief after he requested and received a 30-day extension of time.

CONCLUSION

Jimenez has failed to articulate a recognized basis for the Court to exercise its discretionary power to review the decision below by writ of certiorari. While Jimenez's petition makes repeated references to alleged conflicts created by the Eleventh Circuit's decision, no such conflict exists. The cases cited by Jimenez are not in conflict with the Eleventh Circuit's refusal to reinstate an appeal that was dismissed after Jimenez requested and obtained an extension of time to file his initial brief, yet failed to abide by the requested deadline. Not only did Jimenez fail to abide by the extended deadline, he failed to comply with the Eleventh Circuit's procedures for requesting an additional extension of time and acknowledged his counsel's lack of familiarity with the procedural rules of the Eleventh Circuit. Under these facts, the Authority would respectfully request that the Court deny Jimenez's petition for writ of certiorari.

Respectfully submitted,

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PASTORIZA & GUEDES, P.A.
Attorneys for Respondent
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APPENDIX

APPENDIX A — MOTION FOR EXTENSION OF TIME DATED MAY 26, 2000

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

CASE NO: 00-12139-C

MARIO JIMENEZ,

Plaintiff/Appellant

vs.

HIALEAH HOUSING AUTHORITY, a political subdivision of the City of Hialeah,

Defendant/Appellee.

MOTION FOR EXTENSION OF TIME

Appellant MARIO JIMENEZ, through undersigned counsel and pursuant to FRAP 26(b) and 11th Cir. R. 31-2, respectfully moves this Honorable Court to grant him a 30-day extension of time to file his answer brief and appendix, up to and including July 6, 2000, and as and for good cause would show as follows:

1. Appellant's initial brief and appendix are due on or before June 6, 2000.

2. Plaintiff's undersigned counsel (who is a sole practitioner) is suffering from acute hepatitis B, liver malfunction and chronic diabetes that required his recent

unexpected hospitalization for approximately two weeks. Upon his release from the hospital, the medical prognosis for undersigned counsel is that the debilitating symptoms of his illness will linger for the next 2-3 months.

3. Because of his illness and the press of other work, the undersigned counsel requires a 30-day extension, up to and including July 6, 2000.

4. The undersigned counsel has conferred with Appellee's counsel who opposes an extension request longer than seven (7) days.

5. This motion is being made for good cause and not for the purpose of delay, and the granting hereof will not prejudice any party.

WHEREFORE, Appellant MARIO JIMENEZ respectfully prays that this Court will extend by an additional 30 days, up to and including July 6, 2000, the deadline for him to file his initial brief and appendix in this cause.

I HEREBY CERTIFY that a true and correct copy of the foregoing was telecopied and mailed this 26th day of May, 2000 to: **Edward G. Guedes, Esq.**, Weiss, Serota, Helfman, Pastoriza & Guedes, P.A., Attorneys for Defendant, 2665 South Bayshore Drive, Suite #420, Miami, FL. 33133.

Appendix A

MANZINI & ASSOCIATES, P.A.
Attorneys for Appellant
169 E. Flagler St. – #1500
Miami, FL. 33131
Telephone: (305) 577-9903
Fax No: (305) 577-6121

By: s/ Nicolas A. Manzini
NICOLAS A. MANZINI
Fla. Bar No: 248827

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT GRANTING MOTION OF APPELLANT TO FILE BRIEF DATED AND FILED JUNE 8, 2000

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No: 00-12139-CC

MARIO JIMENEZ,

Plaintiff-Appellant

versus

THE HIALEAH HOUSING AUTHORITY, a political subdivision of the City of Hialeah,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Florida

ORDER:

Motion of Appellant for an extension to file his brief to, and including, July 6, 2000 is granted.

s/ Frank M. Hull
UNITED STATES CIRCUIT JUDGE

Appendix B

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

In Replying Give Number
Of Case And Names of Parties

June 08, 2000

MEMORANDUM TO COUNSEL OR PARTIES

RE: 00-12139-CC
Mario Jimenez v. The Hialeah Housing Authority
DC DKT NO.: 98-02779 CV-EBD

The following action has been taken in the referenced case:

The enclosed order has been ENTERED.

Sincerely,

THOMAS K. KAHN, Clerk

Reply To: Jenifer Alexander
(404) 335-6172

Clerk 4043356100

M/Ext of Time 5/00

Appendix B

Edward G. Guedes
Weiss, Serota, Helfman, et al.
Suite 420, 2665 South Bayshore Drive
Miami FL 33133

June 08, 2000

RE: 00-12139-CC
Mario Jimenez v. The Hialeah Housing Authority
DC DKT NO.: 98-02779 CV-EBD

CC: Edward G. Guedes

CC: Nicolas A. Manzini

CC: Michelle Marie Gallardo

CC: Administrative File

APPENDIX C — UNOPPOSED MOTION FOR LEAVE TO FILE INITIAL BRIEF SEVEN DAYS OUT OF TIME DATED JULY 12, 2000

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
CASE NO: 00-12139-C

MARIO JIMENEZ,

Plaintiff/Appellant

vs.

HIALEAH HOUSING AUTHORITY, a political subdivision of the City of Hialeah,

Defendant/Appellee.

UNOPPOSED MOTION FOR LEAVE TO FILE INITIAL BRIEF SEVEN DAYS OUT OF TIME

Appellant MARIO JIMENEZ, through undersigned counsel and pursuant to all applicable Federal Rules of Appellate Procedure and Eleventh Circuit Rules, respectfully moves this Honorable Court for leave to file his initial brief seven days out of time, that is, on July 13, 2000, and as and for good cause would show as follows:

1. The Court previously granted Appellant an extension of time, up to and including July 6, 2000, for filing his initial brief.

2. Unfortunately, due to his recurring illness (hepatitis B and chronic diabetes) and complication, the undersigned counsel was unable to complete preparation of Appellant's initial brief by the extended deadline (July 6, 2000).

3. The undersigned counsel requests leave of Court to file Appellant's initial brief seven days out of time, that is, on July 13, 2000.

4. The undersigned counsel has conferred with counsel for Appellee HIALEAH HOUSING AUTHORITY prior to filing this motion and is authorized to represent that he does not oppose this motion.

5. This motion is being filed in good faith (due to illness of the undersigned counsel) and not for the purpose of delay or prejudice.

WHEREFORE, Appellant MARIO JIMENEZ respectfully prays for leave to file his initial brief seven days out of time, that is, on July 13, 2000.

I HEREBY CERTIFY that a true and correct copy of the foregoing was telecopied and mailed this 12th day of July, 2000 to: **Edward G. Guedes, Esq.**, Weiss, Serota, Helfman, Pastoriza & Guedes, P.A., Attorneys for Defendant, 2665 South Bayshore Drive, Suite #420, Miami, FL. 33133.

Appendix C

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By: s/ Nicolas A. Manzini
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Fla. Bar No: 248827

APPENDIX D — APPELLANT'S REPLY TO APPELLEE'S RESPONSE TO MOTION FOR LEAVE TO FILE INITIAL BRIEF SEVEN DAYS OUT OF TIME DATED JULY 19, 2000

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

CASE NO: 00-12139-C

MARIO JIMENEZ,

Plaintiff/Appellant

vs.

HIALEAH HOUSING AUTHORITY, a political subdivision of the City of Hialeah,

Defendant/Appellee.

APPELLANT'S REPLY TO APPELLEE'S RESPONSE TO MOTION FOR LEAVE TO FILE INITIAL BRIEF SEVEN DAYS OUT OF TIME

Appellant MARIO JIMENEZ, through undersigned counsel and pursuant to all applicable rules, files this his reply to Appellee HIALEAH HOUSING AUTHORITY's response to his motion for leave to file initial brief seven days out of time and states as follows:

1. For the past 4½ four months, undersigned counsel has suffered from acute hepatitis B, liver malfunction and chronic diabetes and was placed on "disability" status by

his private insurer (New England Financial). As of today, undersigned counsel has still not been able to resume work on a full-time basis. The symptoms of his illnesses are severe nausea, vomiting, dizzy spells, fatigue and the inability to concentrate. Although undersigned counsel's medical condition is improving, his ability to work and to resume normal life activities is still a day-to-day and week-to-week matter. Undersigned counsel has been hospitalized twice because of his illnesses.

2. Due to the illnesses of undersigned counsel, the Court previously granted an extension of time of up to and including July 6, 2000 for Appellant to file his initial brief. Within the limitations of his illnesses, undersigned counsel worked assiduously to complete Appellant's initial brief by the extended deadline. Further, he attempted to associate co-counsel to assist him in the preparation of the initial brief. However, because this is an appeal from an adverse summary judgment dismissing Appellant's employment discrimination case and due to the nature of his fee arrangement with Appellant (contingency fee), undersigned counsel was unsuccessful in his efforts to secure the assistance of another lawyer to work on this appeal.

3. During the extended weekend of July 1-4, 2000, undersigned counsel became severely ill and unable to eat or drink, resulting in his dehydration and requiring round-the-clock bed rest. Around midday on July 5, 2000, undersigned counsel came to the realization that he would not be able to complete Appellant's initial brief by the extended deadline (July 6, 2000). Therefore, he contacted Appellee's counsel

early on July 6th to inform him that he would need "an extra day or two" to complete Appellant's initial brief to which Appellee's counsel replied "no problem".

4. Thereafter, even before he could complete Appellant's initial brief, undersigned counsel prepared an "Unopposed" motion for leave to file the brief out of time wherein he recited that Appellee's counsel had no objection to said motion. Undersigned counsel continued to work diligently toward his goal of completing Appellant's initial brief but was unable to do so before July 12, 2000, that is, six days passed the extended deadline.

5. On July 12, 2000, undersigned counsel overnighted Appellant's initial brief to the Court for filing the next day (July 13th), along with a motion for leave to file the initial brief seven days out of time. Through oversight, undersigned counsel neglected to call Appellee's counsel again to ascertain whether he opposed the motion now that the filing of Appellant's initial brief had been delayed a total of seven days past the extended deadline (July 6, 2000).

6. Undersigned counsel's failure to contact Appellee's counsel a second time was inadvertent. Nevertheless, in light of his health problems (which Appellee's counsel has known about for several months), undersigned counsel did not reasonably expect that Appellee would object to the filing of Appellant's initial brief seven days past the extended deadline (July 6, 2000).

7. Undersigned counsel apologizes for the apparent misunderstanding created by his failure to contact Appellee's

counsel a second time to ascertain his position with respect to the late filing of Appellant's initial brief after it became obvious that more than "an extra day or two" would be required. Undersigned counsel acknowledges that Appellee's counsel did not expressly authorize him to represent to the Court that Appellant's motion for leave to file initial brief seven days out of time was "unopposed". The July 6, 2000 agreement between counsel was that Appellee would not oppose Appellant's request of "an extra day or two" to file the initial brief, period.

8. Undersigned counsel realized that for the first time Appellee objected to his request for permission to file the initial brief seven days out of time on July 13, 2000 when he received a telecopy of Appellee's response to the motion for leave to file the brief seven days out of time, which response stated Appellee's objection. Despite the misunderstanding between counsel, Appellee's response to Appellant's motion for leave to file his initial brief seven days out of time is unduly and unnecessarily harsh. Appellee demands dismissal of this appeal because, "Appellant failed to request a second extension of time in advance of the July 6, 2000 deadline, in violation of Eleventh Cir. R. 31-2(e)."

9. However, it is manifestly clear that the unforeseeable "extraordinary circumstances" required by Eleventh Cir. R. 31-2(d) why Appellant was unable to request an additional extension of time before the expiration of the extended deadline (July 6, 2000) have been established. As shown above, on July 1, 2000, just five days before the extended deadline for filing Appellant's initial brief, undersigned counsel's health took an unexpected turn for the worse.

Undersigned counsel, who is a sole practitioner, remained bedridden until the very day that Appellant's initial brief was due (July 6, 2000). Undersigned counsel was thus unable to request an additional extension to file Appellant's initial brief before the expiration of the extended deadline (July 6th).

10. As a result, Appellant was left with no choice but to file his initial brief belatedly along with his motion for leave to file the brief seven days out of time. In light of these circumstances, the earliest date when undersigned counsel could have filed a request for an additional extension was July 6, 2000, that is, the very day when Appellant's initial brief was due. Even if undersigned counsel had overnighted an extension request to the Court on July 6th, the Court would have received the extension request no sooner than July 7th, that is, after the expiration of the extended deadline for filing the initial brief. At all times, undersigned counsel made a reasonable and good faith attempt to comply with this Court's rules and with the extended deadline for filing Appellant's initial brief.

WHEREFORE, Appellant MARIO JIMENEZ respectfully prays that this Court will overrule Appellee HIALEAH HOUSING AUTHORITY's objection to his motion for leave to file initial brief seven days out of time and that the Court will grant said motion based for good cause shown.

I HEREBY CERTIFY that a true and correct copy of the foregoing was telecopied and mailed this 19th day of July, 2000 to: **Edward G. Guedes, Esq.**, Weiss, Serota, Helfman, Pastoriza & Guedes, P.A., Attorneys for Defendant, 2665 South Bayshore Drive, Suite #420, Miami, FL. 33133.

Appendix D

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By: s/ Nicolas A. Manzini
NICOLAS A. MANZINI
Fla. Bar No: 248827

APPENDIX E — APPELLANT'S MOTION TO SET ASIDE DISMISSAL AND REMEDY DEFAULT DATED JULY 28, 2000

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

CASE NO: 00-12139-C

MARIO JIMENEZ,

Plaintiff/Appellant

vs.

HIALEAH HOUSING AUTHORITY, a political subdivision of the City of Hialeah,

Defendant/Appellee.

APPELLANT'S MOTION TO SET ASIDE DISMISSAL AND REMEDY DEFAULT

Appellant MARIO JIMENEZ, through undersigned counsel and pursuant to 11th Cir. R. 42-2(e), respectfully moves this Honorable Court to set aside the Clerk's entry of dismissal dated July 26, 2000 and to remedy the default by showing the following extraordinary circumstances:

1. For the past 5 months, undersigned counsel has suffered from acute hepatitis B, liver malfunction and chronic diabetes and has been on "disability" status with his private insurer (New England Financial). As of today, undersigned counsel has still not been able to resume work on a full-time

basis. The symptoms and effects of his illnesses are severe nausea, vomiting, dizzy spells, fatigue and the inability to concentrate. Although undersigned counsel's medical condition is improving, his ability to work and to resume normal life activities is still a day-to-day and week-to-week matter. Undersigned counsel has been hospitalized twice because of his illnesses.

2. Due to the illnesses of undersigned counsel, the Court previously granted an extension of time of up to and including July 6, 2000 for Appellant to file his initial brief. Within the limitations of his illnesses, undersigned counsel worked diligently to complete Appellant's initial brief by the extended deadline. Further, he attempted to associate co-counsel to assist him in the preparation of the initial brief. However, because this is an appeal from an adverse summary judgment dismissing Appellant's employment discrimination case and due to the nature of his fee arrangement with Appellant (contingency fee), undersigned counsel was unsuccessful in his efforts to secure the assistance of another lawyer to work on this appeal.

3. During the extended weekend of July 1-5, 2000, undersigned counsel became severely ill and unable to eat or drink, resulting in his dehydration and requiring round-the-clock bed rest. On July 5, 2000, while still bedridden, undersigned counsel came to the realization that he would not be able to complete Appellant's initial brief by the extended deadline (July 6, 2000). He contacted Appellee's counsel early on July 6th to advise him he would need "an extra day or two" to complete the brief.

Appendix E

4. Thereafter, undersigned counsel worked through the week of July 7-9, 2000 toward his goal of completing Appellant's initial brief as quickly as possible but was unable to do so before July 12, 2000, that is, six days past the extended deadline.

5. On July 12, 2000, undersigned counsel overnighted Appellant's initial brief and record excerpts to the Court for filing the next day (July 13th), along with a motion for leave to file the initial brief seven days out of time.

6. The extraordinary circumstances required by Eleventh Cir. R. 42-2(e) why Appellant was unable to request an additional extension of time before the expiration of the extended deadline (July 6, 2000) are present here. As shown above, on July 1, 2000, just five days before the extended deadline for filing Appellant's initial brief, undersigned counsel's health took a sudden and unexpected turn for the worse. Undersigned counsel, who is a sole practitioner, remained bedridden until the very day when Appellant's initial brief was due (July 6, 2000). Undersigned counsel was thus unable to request an additional extension to file Appellant's initial brief before the expiration of the extended deadline (July 6th) due to extraordinary circumstances that were unforeseeable.

7. As a result, Appellant was left with no choice but to file his initial brief belatedly along with his motion for leave to file the brief seven days out of time, which he overnighted to the Court on July 12, 2000. In light of these circumstances, the earliest date when undersigned counsel could have filed a request for an additional extension was July 6, 2000, that

is, the very day when Appellant's initial brief was due. Even if undersigned counsel had overnighted an extension request to the Court on July 6th, the Court would have received the extension request no sooner than July 7th, that is, after the expiration of the extended deadline for filing the initial brief.

8. At all pertinent times, undersigned counsel made a reasonable and good faith attempt to comply with this Court's rules and with the extended deadline for filing Appellant's initial brief and record excerpts.

9. On July 13, 2000, Appellant's motion for leave to file initial brief seven days out of time was stamped by the Clerk. The motion is attached hereto and marked Exhibit "1". Along with his motion, Appellant filed the original and six copies of his brief and the original and four copies of his record excerpts.

10. On July 13, 2000, undersigned counsel received a telecopy of Appellee HIALEAH HOUSING AUTHORITY's response to his motion for leave to file initial brief seven days out of time, which response stated an objection to Appellant's motion.

11. On July 20, 2000, Appellants reply to Appellee's response to motion for leave to file initial brief seven days out of time was stamped by the Clerk. The reply is attached hereto and marked Exhibit "2".

12. On July 28, 2000, undersigned counsel received from the Clerk a) the original and six copies of Appellant's initial brief stamped July 13, 2000, b) the original and four

copies of Appellant's record excerpts stamped July 13, 2000, c) the motion for leave to file initial brief seven days out of time stamped July 13, 2000, d) Appellant's reply to Appellee's response to motion for leave to file brief seven days out of time stamped July 13, 2000, and e) the Clerk's entry of default dated July 26, 2000.

13. Upon receipt of the documents described in paragraph 12 above, undersigned counsel contacted the Clerk telephonically and was advised to seek reinstatement of this appeal through the filing of the within motion.

14. Undersigned counsel has contacted Appellee's counsel who stated that he does not agree to the granting of this motion but will leave it up to the Court to decide.

15. This motion is not being filed for the purpose of delay or for any other improper purpose. No demonstrable prejudice or other hardship will be visited upon either party or counsel by the granting of this motion. This appeal from a final summary judgment has been pending for approximately four months. It is manifestly clear that the extraordinary circumstances that prevented Appellant from applying for an additional extension before July 6, 2000 (i.e., the sudden and unexpected recurrence of the effects of undersigned counsel's illnesses) were unforeseeable. Appellant should not be deprived of his right to have this Court review the district court's erroneous final summary judgment.

Appendix E

WHEREFORE, Appellant MARIO JIMENEZ respectfully prays that the Court will grant this motion and set aside the Clerk's entry of dismissal and let him remedy his default by allowing him to file his initial brief and record excerpts. (Attached hereto are the original and six copies of Appellant's initial brief and the original and four copies of Appellant's record excerpts).

I HEREBY CERTIFY that a true and correct copy of the foregoing was telecopied and mailed this 28th day of July, 2000 to: **Edward G. Guedes, Esq.**, Weiss, Serota, Helfman, Pastoriza & Guedes, P.A., Attorneys for Defendant, 2665 South Bayshore Drive, Suite #420, Miami, FL. 33133.

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By: s/ Nicolas A. Manzini
NICOLAS A. MANZINI
Fla. Bar No: 248827

APPENDIX F — APPELLANT'S REPLY TO APPELLEE'S RESPONSE TO MOTION TO REINSTATE APPEAL DATED AUGUST 1, 2000

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

CASE NO: 00-12139-C

MARIO JIMENEZ,

Plaintiff/Appellant

vs.

HIALEAH HOUSING AUTHORITY, a political subdivision of the City of Hialeah,

Defendant/Appellee.

APPELLANT'S REPLY TO APPELLEE'S RESPONSE TO MOTION TO REINSTATE APPEAL

Appellant MARIO JIMENEZ, through undersigned counsel and pursuant to all applicable rules, replies to Appellee HIALEAH HOUSING AUTHORITY's response to his motion to reinstate appeal and states:

1. In its response, Appellee appears to be somewhat incredulous of a) the seriousness of undersigned counsel's illnesses, and b) the reason why undersigned counsel was unable to apply for an additional extension to file Appellant's initial brief before the deadline expired (July 6, 2000).

Appendix F

2. Attached hereto as Exhibit "1" is a letter dated June 23, 2000 to undersigned counsel from New England Financial. New England Financial is undersigned counsel's disability insurer. As evidenced by the letter, undersigned counsel a) was considered totally disabled until July 17, 2000, and b) as of June 23, 2000, that is, just thirteen days before the deadline to file Appellant's initial brief, undersigned counsel's health had improved to the point that he expected to return to work in the immediate future. Logically, undersigned counsel believed he could complete and file Appellant's brief on time.

3. Unfortunately, as explained in comprehensive detail in Appellant's motion to reinstate this appeal, undersigned counsel's health took a sudden and unexpected turn for the worse on July 1, 2000. Undersigned counsel (a sole practitioner) was bedridden until July 6, 2000. Based upon the Court's prior rules, undersigned counsel was under the impression that the proper procedure (after the expiration of the deadline to file the brief) was to submit the brief and record excerpts along with a motion to file the brief out of time. That is precisely what undersigned counsel did on July 12, 2000. The Clerk received the brief and record excerpts and Appellant's motion to file them out of time on July 13, 2000.

4. Appellant's first knowledge that his motion for leave to file his brief and record excerpts out of time had not been "filed" and that this appeal was dismissed by the Clerk came on July 28, 2000, when all of said documents were returned to him. Appellant immediately tried to cure his default by filing a timely motion to reinstate this appeal, along with his brief and record excerpts.

Appendix F

WHEREFORE, based upon the extraordinary circumstances shown here and in his motion to set aside the Clerk's entry of dismissal, Appellant MARIO JIMENEZ respectfully prays that this Honorable Court will reinstate this appeal and direct the Clerk to accept his brief and record excerpts for filing in this cause.

I HEREBY CERTIFY that a true and correct copy of the foregoing was telecopied and mailed this 1st day of August, 2000 to: **Edward G. Guedes, Esq.**, Weiss, Serota, Helfman, Pastoriza & Guedes, P.A., Attorneys for Defendant, 2665 South Bayshore Drive, Suite #420, Miami, FL. 33133.

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By: s/ Nicolas A. Manzini
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Fla. Bar No: 248827

APPENDIX G — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT RE RULES AND INTERNAL OPERATING PROCEDURES DATED DECEMBER 1999

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

Norman E. Zoller
Circuit Executive

December 1999

MEMORANDUM

We are pleased to enclose revisions to the Rules and Internal Operating Procedures (IOPs) of the Eleventh Circuit that take effect on January 1, 2000. Please insert the enclosed replacement pages into your existing copy of the rules in the manner set forth on the reverse of this memorandum.

The court adopted *MORE STRINGENT* procedures for requesting extensions of time to file briefs and record excerpts in civil appeals. The revised rules distinguish between a party's *first* request for an extension of time of *seven calendar days or less*, a party's *first* request for an extension of time of *more than seven calendar days*, and a party's *second* request for an extension of time. *See* 11th Cir. R. 31-2. ***PRACTICE NOTE***: Standards for granting a second request are higher than the standards for granting a first request. Parties are well advised to properly plan and make the first request appropriate and accurate.

Appendix G

The court also adopted *MORE STRINGENT* rules that provide for **DISMISSAL WITHOUT FURTHER NOTICE** in civil appeals when appellant fails to file or correct a brief or record excerpts within the time permitted, and that establish *MORE STRINGENT* procedures for requesting **reinstatement** of a civil appeal thus dismissed. *See* 11th Cir. R. 42-2 and 42-3.

The revised circuit rules and IOPs are available on the Internet at **www.ca11.uscourts.gov**. All future rules revisions will be available on the Internet.

We welcome comments and suggestions concerning our local rules and internal operating procedures.

s/ Thomas K. Kahn	s/ Norman E. Zoller
Thomas K. Kahn	Norman E. Zoller
Clerk of Court	Circuit Executive